Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Sean Bernat, *et. al.*,

Petitioners,

v.

The Honorable Michael G. Allphin, *et. al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court For The State Of Utah

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The State of Utah employs a two-tier trial system to provide misdemeanant defendants with their right to appeal from a court not of record (the justice court) to a trial de novo in a court of record (the district court). Defendants in Utah who appeal the decision from the court not of record appear before the court of record convicted of the very crime for which they will be tried again. Utah's scheme does not vacate the judgment of the justice court prior to the appeal and receipt of the de novo trial in the court of record.

I. Whether Utah's failure to permit the justice court defendant to face his de novo trial while still burdened by the result of the first conviction violates the Double Jeopardy Clause of the United States Constitution.

II. Whether Utah's two-tiered system violates Due Process by requiring the defendant to file a certificate of probable cause and earn a right to appeal that is otherwise guaranteed him by federal constitutional safeguards.

III. Whether Utah's two-tiered system violates the federal constitutional tenet of Equal Protection of the law by providing disparate treatment for similarly situated criminal defendants.

LIST OF ALL PARTIES

(with dates of the Utah Court of Appeals decisions joined in the Bernat case)

Sean Bernat v. The Honorable Michael G. Allphin,
2003 UT App 394, Decided June 12, 2003

Jeremy Kee v. The Honorable Bruce C. Lubeck,
2003 UT App 177, Decided May 30, 2003

Donald Lang v. The Honorable Ann Boyden,
2003 UT App 176, Decided May 30, 2003

Darrin Mann v. The Honorable Glen R. Dawson,
2003 UT App 383, Decided June 12, 2003

Matthew Phillips v. The Honorable Donald J. Eyre,
2002 UT App 311, Decided June 12, 2003

Joseph Scovell v. The Honorable Denise P. Lindberg,
2003 UT App 8, Decided June 12, 2003

Dylan T. Serre v. The Honorable Michael K. Burton,
2002 UT App 264, Decided June 12, 2003

Mark Wahlstrom v. The Honorable Glen R. Dawson,
2002 UT App 309, Decided June 12, 2003

Henry T. Zakharian v. The Honorable Michael K. Burton,
2003 UT App 111, Decided April 17, 2003

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Judgment appealed from:

Bernat v. Allphin, 106 P.3d 707, 2005 UT 1. The opinion is attached in Appendix A.

Opinions from the lower court:

Bernat v. Allphin, Order Denying Petition for Extraordinary Relief. Utah Court of Appeals. Filed Jun 12, 2003. See Appendix B. Citing Zakharian v. Burton, 2003 UT App 111. Opinion not for official publication. Filed April 17, 2003. Also see Appendix C.

Centerville City v. Bernat, 2002 UT App 394. opinion not for official publication. Filed November 29, 2002. The opinion is attached in Appendix D.

STATEMENT OF JURISDICTION

The Utah Supreme Court denied petitioners their federal constitutional claims of double jeopardy, due process and equal protection violations on January 7, 2005. The opinion is attached in Appendix A.

CONSTITUTIONAL PROVISIONS

The Fifth and Fourteenth Amendments to the United States Constitution are reproduced in Appendix E.

STATEMENT OF THE CASE

Rule 4-608 of the Utah Rules of Judicial Administration, Utah Code Ann. § 78-5-120 and Rule 27 of the Utah Rules of Criminal Procedure (hereinafter "the Utah scheme," provisions reproduced in Appendix F) establish the appellate process for a defendant convicted of a misdemeanor in the justice courts of Utah. Importantly, Utah's justice courts are not courts of record. The Utah scheme requires that those charged and convicted of misdemeanor crimes in the justice court receive their constitutionally protected appellate rights by appealing to the district court (the Utah trial court with original jurisdiction and a court of record). In the district court the defendants receive a trial de novo.

Defendants in Utah who appeal the decision from the justice court, however, find themselves facing trial in the district court still convicted of the very crime for which they will be tried again. Utah's scheme does not vacate the judgment of the justice court on filing the appeal and on receipt of the de novo trial in the court of record.

The petitioners herein, after suffering convictions from a variety of justice courts throughout Utah, independently filed timely notices of appeal to the respective district courts as permitted by the Utah scheme. On facing their de novo trials for the same charges they were convicted of in justice court, and while remaining convicted of those justice court adjudications, petitioners filed motions to dismiss their cases due to the federal constitutional violations of double ~~jeop~~ardy, due process and equal protection rights.

Specifically, petitioners did not challenge that a trial de novo is an unconstitutional application of the right to appeal. That issue has been decided by this Court. Rather, petitioners claimed that Rule 4-608 of the Utah Rules of

Judicial Administration, Utah Code Ann. § 78-5-120 (1953 as amended) and Rule 27 of the Utah Rules of Criminal Procedure operate to violate Petitioners constitutional rights in three distinct ways.

First, double jeopardy rights are violated by the process that requires Petitioners to arrive in district court for a trial de novo while still under jeopardy from a justice court conviction.

Second, due process rights are violated by the process which unconstitutionally shifts the burden of proof and persuasion to the accused requiring him to demonstrate that he must earn a right to appeal that is guaranteed him by constitutional safeguards. Due process also is violated by the procedures which are contrary to the presumptions of innocence and burdensome to the protected rights to a fair trial.

Third, equal protection guarantees are violated when others similarly situated as petitioners are offered greater protections. Others charged with the same and similar misdemeanor offenses that begin their charges in district court enjoy greater rights than those offered to petitioners and those similarly situated whose cases begin in the justice courts.

The respondent district court judges named as parties herein failed to vindicate the important constitutional protections complained of and redress was sought individually by the petitioners at the Utah Court of Appeals.

Appeals to the Utah Court of Appeals were routinely dismissed by that court asserting a lack of jurisdiction because petitioners' appeals allegedly failed to challenge a statute or ordinance and were therefore not permitted an additional appeal beyond the trial de novo. See Appendix C.

Petitioners next filed for extraordinary relief with the Utah Court of Appeals requesting a writ of mandamus to direct the district courts to correct the erroneous denial of the motions to dismiss based on violations of the federal constitution. The Utah Court of Appeals entered orders denying the Petitions for Extraordinary Relief. See Appendix B.

Petitioners then prepared and filed with the Utah Supreme Court a Petition for Writ of Certiorari to the Utah Court of Appeals. Petitioners joined together in the Petition before the Utah Supreme Court. Their Petition was granted by the Utah Supreme Court on September 25, 2003. The Utah Supreme Court, however, denied petitioners claims in the opinion now the subject of this Petition for Writ of Certiorari. The Utah Supreme Court's opinion is attached at Appendix A.

ARGUMENT

COMPELLING REASONS FOR ISSUANCE OF THE WRIT OF CERTIORARI

The Utah Supreme Court, in authoring Bernat v. Allphin, 106 P.3d 707, 2005 UT 1, decided important questions of federal law that has not been, but should be, settled by this Court. Rule 10(c), Rules of the Supreme Court of the United States.

The Utah Supreme Court's treatment of the federal issues presented in Bernat decided important federal issues in a way that conflicts with relevant decisions of this Court. Rule 10(c), Rules of the Supreme Court of the United States.

The Utah Supreme Court in Bernat decided important federal questions in a manner conflicting with decisions of other state courts of last resort. Rule 10(b), Rules of the Supreme Court of the United States.

Point I. The Utah Supreme Court erroneously decided that double jeopardy is not violated by Utah's scheme which fails to vacate the first tier conviction prior to defendant appearing at the second tier de novo trial.

A. This issue has not been addressed previously by this Court, and should be settled by this Court as raised in this case.

Petitioners urged the Supreme Court of Utah to find a federal double jeopardy violation in the Utah two tiered scheme that provides misdemeanor defendants their appellate

right through a second tier trial de novo without vacating the judgment of the first tier non-record court. Petitioners' claim is supported both explicitly and impliedly by this Court's prior rulings in a number of two-tiered cases. Colten v. Kentucky, 407 U.S. 104 (1972), Ludwig v. Massachusetts, 427 U.S. 618 (1976) and Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984). None of these cases, however, focused on the precise issue presented in this case. The Utah Supreme Court agreed stating as follows:

> Neither Colten, Ludwig, nor Lydon directly addressed whether a sentence imposed in a justice court must be vacated pending a de novo trial. Nevertheless, Petitioners argue that the explicit and implicit language in these cases requires such action to survive constitutional scrutiny under the Double Jeopardy Clause. We disagree.

Bernat v. Allphin, 2005 UT 1, ¶ 22.

The Utah court acknowledged and conceded, however, that the above cited cases discuss the importance of vacating the conviction and cleaning the slate prior to the de novo trial:

> We acknowledge that a defendant's ability to automatically obtain a "clean slate" on appeal from a justice court conviction played an important role in the Court's determination that the systems examined in Colten, Ludwig, and Lydon were constitutional. However, the Kentucky and Massachusetts systems examined in those cases were structured in such a way that a defendant appealing a conviction from a justice court was best viewed as if he or she had successfully appealed a district court conviction, obtained a reversal, and been granted a new trial. See

> Ludwig, 427 U.S. at 631 ("A defendant who elects to be tried de novo [under the Massachusetts system] is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial."). Utah's justice court system is different.

Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 23. The court correctly decided that Utah's scheme is different than those systems examined by the United States Supreme Court but erroneously concluded that those differences do not require the first tier conviction to be vacated.

In finding no double jeopardy violation the Utah Supreme Court misconstrued the critical import of what petitioners believe is a threshold constitutional question and requirement to vacate the conviction in the first tier adjudication prior to providing the de novo trial. In fact, both the petitioners and the court referenced many of the same quotations and authority for their respective positions. This Court should reach the double jeopardy issue presented in this Petition, correct the state court's interpretation and resolve whether federal rights are violated by a state scheme to utilize two tiered systems without vacating judgments occurring in the first tier on the filing of the appeal to the trial de novo.

In its analysis the Utah court erroneously deduced that Utah's scheme did not suffer from double jeopardy violations of constitutional significance under the theories (1) that jeopardy does not terminate when a defendant is convicted in the justice court and (2) that this concept of continuing jeopardy is supported because the defendant alone elects whether to file an appeal to instigate the de novo trial and somehow removes any possible double jeopardy concern. The Utah Supreme Court reasoned:

> Thus, we conclude that Utah's two-tier justice court system does not violate the prohibition against double jeopardy, even though a defendant's sentence from justice court is not automatically vacated pending a trial de novo in district court. Jeopardy does not terminate when a defendant is convicted in justice court; therefore, a defendant is not placed twice in jeopardy when he or she requests a de novo trial. Because "'nothing in the Double Jeopardy Clause prohibits a [s]tate from affording a defendant two opportunities to avoid conviction and secure an acquittal[.]'" Lydon, 466 U.S. at 312 (quoting Ludwig, 427 U.S. at 632).

Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 33(citation in original).

To reach its conclusion the court misplaced reliance on Lydon to conclude the continuing jeopardy argument could be applied to Utah's scheme. It is the former Massachusetts system addressed in Lydon, not Utah's scheme, which is constitutionally different. This Court explained the uniqueness in Lydon as follows:

> Under Massachusetts law, a defendant charged with certain crimes in Boston Municipal Court may elect either a bench trial or a jury trial. If a defendant chooses a jury and is convicted, he has the normal appellate process open to him, while a defendant dissatisfied with the results of a bench trial, if he elects that course, has an absolute right to a trial de novo before a jury. A convicted defendant who has chosen a bench trial need not allege error at that trial to obtain de novo review. On the other hand, he may not rely upon error at the bench trial to obtain reversal of his conviction; his only recourse is a trial de novo.

Lydon, 466 U.S. at 297(citations and footnote omitted). At first blush, this quote appears to support the Utah court's analysis. Later in the opinion, however, this Court reminded that the key aspect of the Lydon ruling for purposes of this issue on appeal is that the first tier conviction is in fact vacated. The Lydon Court stated:

> A number of features of the Massachusetts system persuade us that it does not constitute "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," even when a defendant convicted at the first tier claims insufficiency of the evidence.
>
> We note at the outset that Lydon was in "jeopardy" in only a theoretical sense. Although technically "jeopardy" under the Double Jeopardy Clause entails the "potential or risk of trial and conviction, not punishment," it is worthy of note that ***virtually nothing can happen to a defendant at a first-tier trial that he cannot avoid.*** He has an absolute right to obtain the de novo trial, and he need not allege error at the first-tier trial to do so. ***Once the right to a de novo trial is exercised, the judgment at the bench trial is "wiped out."***

Lydon, 466 U.S. at 310(quoting Price v. Georgia, 398 U.S. 323, 329 (1970)(citations omitted)(emphasis added).

The Utah Supreme Court misplaced its focus on the idea that Lydon's issue was distinct than that herein. Lydon reviewed the question whether a state could provide a two tier system without violating double jeopardy concerns. That issue has never been postulated by petitioners. Rather petitioners claim has always been on whether vacating the judgment of the first tier court is required under Fifth

Amendment Double Jeopardy jurisprudence as a threshold consideration.

Importantly, the "continuing jeopardy" concept embraced by a faction of the Lydon Court [and refuted by another] passed constitutional muster only because the Court found that the Massachusetts system placed a defendant "in jeopardy only in a theoretical sense." Id. at 310. This determination was reached due to the observation that "virtually nothing could happen to a defendant at a first-tier trial that he [could] not avoid" because the absolute right to a de novo trial "wiped out" the bench trial judgment. Id. The "wiping out" of all the lower court's consequences in conjunction with the appeal for the de novo trial is the linchpin of this reasoning. In fact, contrary to the Utah court's analysis, the continuing jeopardy discussion in Lydon only becomes reasonable by understanding that the defendant can choose to continue his original jeopardy by opting for the de novo trial, thereby annulling the first tier judgment. Only then are double jeopardy concerns alleviated when the defendant stands before the second tier de novo trial unencumbered by the prior conviction.

Absent the automatic "wiping out" or "cleaning of the slate," basic to the Court's reasoning, the defendant's state of jeopardy is not theoretical at all, but is real. Utah's reliance on "continuing jeopardy" as justification not to vacate the judgment fails to cure constitutional defects as the Utah scheme lacks the critical protections the system at issue in Lydon possessed. As stated by one of the concurrences in Lydon, the Utah decision amounts to little more than the "mere incantation of the phrase "continuing jeopardy," partak[ing] in the sort of "conceptual abstractions" that [this Court's] decisions elaborating the requirements of the Double Jeopardy Clause have attempted to avoid." Lydon, 466 U.S. at 315 (Brennan, J. Concurring in part).

In clear and unambiguous terms the Lydon Court, talking about the different system in Massachusetts, reiterated the nature of double jeopardy protections, to wit:

> Our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects (1) against a second prosecution for the same offense after acquittal, **(2) against a second prosecution for the same offense after conviction,** and (3) against multiple punishments for the same offense.

Lydon, 466 U.S. at 306-07(citing Illinois v. Vitale, 447 U.S. 410, 415 (1980). The Utah Supreme Court adopted this quote from Lydon cataloging the vagaries of multiple prosecutions but confuses the prohibitions of second prosecutions. The language quoted by the court from Green v. United States is provided without the bookended comments from either side of the quote extolling the original purposes to the protection against double jeopardy:

> The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> . . . . .
>
> The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

Green, 355 U.S. 184, 187-88 (1957)(quoting United States v. Ball, 163 U.S. 662, 669 (1896). This Court has more recently reaffirmed this earlier statement, from Ball, by

explaining, "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." Price v. Georgia, 398 U.S. 323 (1970). This expanded perspective of the purpose of double jeopardy protections discredits the Utah court's analysis.

Perhaps of greater concern and an even more compelling example of the Utah Supreme Court's result oriented jurisprudence in denying petitioners constitutionally protected rights is the courts treatment expounding the design and purpose of the lower tier courts. The court, citing Colten, supports its decision on the nature of the justice courts quoting this Court as follows:

> [These courts] are designed, in the interest of both the defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction.

Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 32 (quoting Colten, 407 U.S. at 114.

Importantly, the quote is inequitably interrupted mid-sentence to dissuade and rule against petitioners' argument. The remainder of the quote, picked up in mid-sentence from where the Utah Supreme Court abruptly stopped, importantly continues as follows:

> . . . [first purpose of justice courts is speed and less costly than general jurisdiction courts] *where the full range of constitutional guarantees is available*; second, if the defendant is not satisfied with the results of his first trial he has *the unconditional right* to a new trial in a superior court, ***unprejudiced by the proceedings or the outcome in the inferior courts***.

Colten, 407 U.S. at 114 (emphasis added). This deliberate approach by the court to justify its scheme at the expense of double jeopardy rights demonstrates this Court's need to grant the Writ of Certiorari.

Petitioners respectfully request the Court grant the Petition for Writ of Certiorari in this matter and decide the question whether the double jeopardy provision of the federal constitution requires that states, through the fourteenth amendment, vacate the conviction from the first tier on the defendants invocation of his right to the de novo trial in two tiered schemes like that of Utah.

B. Prior authority of this Court requires states to vacate judgments from the first tier court once the de novo trial is requested.

This Court, on at least three occasions, has reviewed de novo appellate systems, each time for reasons similar to yet distinct from that presented in this Petition. Importantly, each time the Court has addressed the subject of de novo trial appellate review in the two-tiered system the Court has provided both explicit and implicit language instructing that Utah's scheme violates double jeopardy principles.

In each of the cases reviewed, this Court acknowledged that the convictions from the trial in the non court of record must be vacated before the de novo trial can begin.

In 1972 the Court rejected a complaint that an enhanced punishment at the trial de novo violated due process and double jeopardy. Colten v. Kentucky, 407 U.S. 104 (1972). The Court examined the two-tiered appellate process of Kentucky and repeatedly recognized the requirement that the second prosecution continues without any consequence or remaining jeopardy from the results of the first prosecution.

> Kentucky, like many other States, has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors may be charged and tried in a so-called inferior court, where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. If convicted after trial or on a guilty plea, however, he has a right to a trial de novo in a court of general criminal jurisdiction, so long as he applies within the statutory time. The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. ***If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Prosecution and defense begin anew. . . . The case is to be regarded exactly as if it had been brought there in the first instance.*** A convicted defendant may seek review in the state appellate courts in the same manner as a person tried initially in the general criminal court. However, a defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial de novo.

Colten, 407 U.S. at 112-13 (emphasis added; citations omitted). Later the Court stated:

> We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. *Such proceedings offer a defendant the opportunity to learn about the prosecution's case and,*

> *if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction.* He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, *whose advice will also be available in determining* ***whether to seek a new trial, with the slate wiped clean,*** *or to accept the penalty imposed by the inferior court.* The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the ***defendant has the choice of beginning anew.***

Colten, 407 U.S. at 118-19 (emphasis added).

Importantly, the Kentucky scheme analyzed in Colten expressly provided that on the filing of the appeal the sentence of the justice court was to be vacated.

> In all instances, a defendant in Kentucky facing a criminal sentence is afforded an opportunity to be tried de novo in a court presided over by a lawyer-judge ***since an appeal automatically vacates the conviction*** in police court. The trial *de novo* is available after either a trial or a plea of guilty in the police court; a defendant is entitled to bail while awaiting the trial.

North v. Russell, 427 U.S. 328, 334-35 (1976)(citations omitted)(emphasis added). Notably, the North Court concluded that a two-tiered de novo trial system utilizing non-lawyer judges in the inferior court violated neither due process nor equal protection precisely because the accused were provided a de novo trial under the Kentucky scheme before a court of general criminal jurisdiction. Id. at 337-39. Significantly, the Court relied on language from Colten noting:

> A defendant can have an initial trial before a lawyer-judge by pleading guilty in the police court, thus bypassing that court and seeking the De novo Trial, "erasing . . . any consequence that would otherwise follow from tendering the (guilty) plea."

Id. at 337 (quoting Colten v. Kentucky, 407 U.S. at 119-20). Utah permits non-lawyer judges in justice courts. That use of lay judges in Utah justice courts is not itself a violation as explained in North; except that the conviction obtained from that justice court in Utah is not vacated on the filing of the Notice of Appeal as the North Court analyzed as the saving principle in such cases. Utah's failure to "wipe the slate clean" and "begin anew" in the court of general criminal jurisdiction renders the Utah scheme unconstitutional under double jeopardy grounds.

As in Colten, the system in Ludwig survived scrutiny precisely because the jeopardy from the first case was vacated under the Massachusetts's scheme and any consequences of that conviction terminated prior to or with the filing of the notice of the accused's intent to take his trial de novo appeal. Massachusetts's scheme survived the constitutional challenge for the same reason Kentucky's scheme survived. Each system vacated the conviction from the inferior court on filing the notice to appeal. Again, Utah's scheme contrarily does not vacate the conviction from the inferior court. When Petitioners arrive in district court in Utah they therefore face jeopardy for the second time on the same charges of which they are currently guilty—in violation of double jeopardy safeguards.

Ludwig demonstrates this critical difference at the outset of the opinion as the Court explains the procedure employed.

> Unlike the two-tier Kentucky system under consideration in Colten v. Kentucky an accused in Massachusetts does not avoid trial in the first instance by pleading guilty. Nevertheless, he achieves essentially the same result by an established, informal procedure known as "admitting sufficient findings of fact." This procedure is used "[i]f the defendant wishes to waive a trial in the District Court and save his rights for a trial in the Superior Court on the appeal." The trial court then hears only enough evidence to assure itself that there is probable cause to believe that the defendant has committed the offense with which he is charged. The court, however, does make a finding of guilt and enter a judgment of conviction.
>
> *Once a person convicted in the [inferior jurisdiction] indicates that he is going to appeal,* ***his conviction is vacated.***

Ludwig, 427 U.S. at 621-22 (emphasis added; citations omitted). The Court then later added a significant observation:

> *The decision to secure a new trial rests with the accused alone.* A defendant who elects to be tried de novo in Massachusetts is in *no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial.* Under these circumstances, it long has been clear that the State may reprosecute. The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that ***a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial.*** Nothing in

> the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal.

Ludwig, 427 U.S. at 631-32 (emphasis added; citations omitted). The Court in Ludwig highlights the critical distinction missing from our Utah scheme that ***"[o]nce a person convicted in the [first court] indicates that he is going to appeal, his conviction is vacated."*** Ludwig, 427 U.S. at 621-22 (emphasis added).

Finally, in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), the United States Supreme Court again included as a part of its holding the very important factual understanding of the rules pertinent to Massachusetts. The exact issue in the case is distinct from that presented in this writ; yet the Court's conclusions against Lydon fully support and establish that the first and underlying conviction is vacated on inception of the de novo trial as an appeal.

> We note at the outset that Lydon was in "jeopardy" in only a theoretical sense. *Although technically "jeopardy" under the Double Jeopardy Clause entails the "potential or risk of trial and conviction, not punishment," **it is worthy of note that virtually nothing can happen to a defendant at a first-tier trial that he cannot avoid.*** He has an absolute right to obtain the de novo trial, and he need not allege error at the first-tier trial to do so. ***Once the right to a de novo trial is exercised, the judgment at the bench trial is "wiped out."***

Lydon, 466 U.S. at 310 (emphasis added; citations omitted). The Court then added:

> To put the matter another way, as we observed in Colten v. Kentucky, a defendant's choices in a two-tier system are [i]n reality . . . to accept the decision of the judge and the sentence imposed in the inferior court ***or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of a judge or jury in the superior court, with sentence to be determined by the full record made in that court.***

Lydon, 466 U.S. at 312 (emphasis added; citation omitted). Notably, the reliance by the Lydon Court on Colten requires inclusion of the concluding comment by the Court in Colten v. Kentucky when it states:

> Colten urges that his [double jeopardy] claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. . . . *The contention [of Colten] also ignores that a defendant can bypass the inferior court simply by pleading guilty and* ***erasing immediately thereafter any consequence*** *that would otherwise follow from tendering the plea.*

Colten v. Kentucky, 407 U.S. at 119-20. Critically, Utah's scheme falls short of those schemes from Massachusetts and Kentucky examined and approved by the United States Supreme Court as discussed in the above cases.

Unlike Utah's scheme, the systems evaluated in these cases vacate the judgments of the prior jeopardy in order to place the accused in the appropriate constitutional posture before a new trial. Utah justice courts, by rule and practice, are not "*erasing immediately thereafter any consequence*" on filing of a notice of appeal as required by the double jeopardy clauses and the decisions from the Supreme Court. Rather,

the Utah justice courts leave the convicted justice court defendant under jeopardy while sending him to appeal to the district court by de novo trial, thereby violating the double jeopardy provision of successive prosecutions on the same charges.

This Court should issue the Writ of Certiorari as prior decisions from this Court demonstrate the erroneous nature of the Utah Supreme Court's opinion.

C. The Utah Supreme Court's decision to not vacate the judgment from the first tier court is in conflict with decisions of other state courts of last resort.

Over twenty years ago this Court made note in Lydon of the number of states that incorporate a two-tier system for adjudicating less serious criminal offenses. Lydon, 466 U.S. at 112 (listing statutory references to 24 different states that had incorporated a two-tier system). Utah's two tiered de novo appellate scheme and the holding in this case now before the Court are in conflict with many of the two tiered systems of those other states.

In examining how other states work with a two-tier system, we begin with those systems which have already undergone the scrutiny of this Court. This Court has reviewed and deemed as constitutional the two-tier systems in Massachusetts, Kentucky and North Carolina – all three of these states share as a common characteristic the "clean slate" petitioners contend is required. See Ludwig, 427 U.S. at 632 (stating that a convicted defendant in Massachusetts may obtain a reversal and a new trial without assignment of error in the proceedings at his first trial.); Lydon, 466 U.S. at 310 (commenting that once the right to a de novo trial is exercised, the judgment at the bench trial is "wiped out.");

Colten, 407 U.S. at 113 (asserting that if a defendant seeks a new trial the Kentucky statutory scheme contemplates that the slate be wiped clean); Blackledge v. Perry, 417 U.S. 421, 422 (1974)(mentioning that in North Carolina any defendant convicted in District Court has an absolute right to a trial de novo in Superior Court, and when the appeal is taken . . . the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court).

The court below acknowledged that "a defendant's ability to automatically obtain a "clean slate" on appeal from a justice court conviction played an important role in the [Supreme] Court's determination that the systems examined in Colten, Ludwig, and Lydon were constitutional." See Bernat, 106 P.3d 707, 2005 UT 1 at ¶ 23. The Utah court does not offer sufficient justification for a system to exist without such a protection, it merely posits that the posture of the defendant justifies maintaining their guilty status. Id. The fact remains that regardless of how a defendant's posture is framed, any system requiring convicted defendants to face an entirely "new trial" on the same facts is disingenuous and in violation of Fifth Amendment double jeopardy protections.

Along with this Court's more than incidental treatment of the role of a "clean slate" in a trial de novo, a number of other states have explained the critical requirement of vacating the lower court's conviction as a constitutionally essential component of their two-tier systems.

For example, case law from the state of Kansas demonstrates that "Kansas has codified the protection against double jeopardy" and directly applied the same to their two-tier system. Salina v. Amador, 85 P.3d 724, 726 (Kan.App. 2004). The relevant Kansas code section provides:

> (1) A prosecution is barred if the defendant was formerly prosecuted for the same crime, based upon the same facts, if such former prosecution:
> (a) Resulted in either a conviction or an acquittal.

Kan. Stat. Ann. § 21 – 3108(1)(a) (2003). This section has been construed by the Kansas courts to stand for the premise that a defendant's "conviction by the municipal court [is] vacated when he appeal[s] to the district court for a trial de novo." Amador, 85 P.3d at 727.

The Supreme Court of New Hampshire has spoken regarding their framework of their two-tier system. According to the highest court in New Hampshire:

> A person convicted by a district or a municipal court of a class A misdemeanor, at the time the sentence is declared, *may appeal therefrom to the superior court which shall hear the appeal.* The effect of such an appeal is to vacate that judgment and transfer the whole proceeding to the Superior Court, there to be tried *de novo* on the original complaint.

State v. Guy, 667 A.2d 1026, 1027 (N.H. 1995)(emphasis in original, internal quotations and citations omitted).

The courts in Connecticut have defined as well the position of their state regarding necessary steps to protect against double jeopardy. The courts in this state have long held that, "It is well settled in this state that an appeal from the judgment of a justice of the peace vacates the judgment of the justice, and the case stands in the appellate court precisely as though brought there in the first instance." State v. Ashman, 153 A. 654, 655 (Conn. 1931); Ely v. Bugbee, 90 Conn. 584, 588, 98 A. 121, 123 (Conn. 1916).

Alabama speaks forcefully with regard to this question. According to Alabama law, "when an appeal is allowed by statute from the judgment of an inferior court to a superior court, where the case is to be tried de novo, . . . a trial *de novo* means a new trial 'as if no trial had ever been had, and just as if it had originated in the circuit court.'" Ball v. Jones, 132 So.2d 120, 122 (1961). This stance has been given even further clarification as another Alabama court asserted: "A trial de novo means that the slate is wiped clean and a trial in the Circuit Court is had without any consideration being given to prior proceedings in another Court." Clark v. City of Mobile, 357 So.2d 675, 678, (Ala.Crim.App. 1978)(quoting Yarbrough v. City of Birmingham, 353 So.2d. 75 (Ala.Crim.App. 1977)). Yet another court in Alabama further clarified, "[w]hen on appeal the case is triable de novo, it stands as though no judgment had ever been rendered in the lower court." Jones v. City of Daphne, 519 So.2d. 587 (Ala.Crim.App. 1986).

Maine echoes the protective language of these other states in their consideration of this issue. The Supreme Court in Maine expressed the view that "a defendant found guilty in the District Court ha[s] a right to appeal and get a trial de novo. When the case comes before the Superior Court, the entire slate is wiped clean as if brought there initially. An entirely different court hears the case anew." State v. Palmer, 468 A.2d 985, 988 (Me. 1983).

Indiana takes a similar view with their process, contending that in their two-tier system, "The appeal [to the higher court], in fact, is more than a stay of the judgment of conviction before the justice. It vacates that judgment and transfers the whole proceeding to the court appealed to, there to be tried . . . de novo." Hensley v. State, 244 N.E.2d 225, 227 (Ind. 1969).

These examples of states that hold the opposing viewpoint of the Utah Supreme Court's ruling is not intended to be exhaustive, but rather to serve as an illustration of the split of authority in interpreting two tiered jurisprudence. These examples also demonstrate the pressing need for this Court to grant this Petition and determine the matter.[1]

Some states have ruled consistent with Utah's court. In the state of Washington, "A trial de novo in superior court as the result of a conviction and appeal taken in municipal court does not signal the initiation of an entirely new criminal process or procedure." Seattle v. Crockett, 551 P.2d 740, 741-742 (Wash. 1976). The Washington system maintains that, "The slate has not been wiped clean . . . The judgment of conviction rendered by the municipal court still exists and the appeal merely suspends operation of the judgment." Id. Although the Washington system fails to vacate the lower court conviction, it is worth noting that the automatic suspension of the judgment offers a defendant more protection than the Utah scheme. See e.g., City of St. Louis v. Rollins, 32 S.W.3d 187, 189 (Mo.App. E.D., 2000) (explaining that the filing of an application for trial de novo alone does not vacate or annul the municipal court's judgment, but that the application for appeal merely suspends the execution of the judgment pending final disposition of the trial de novo.) See Petitioner's Point II, Due Process Argument.

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[1] Notably, California and Massachusetts have recently taken measures to eliminate the two tier systems they once had in place. See generally General Electric Capital Auto Financial Services, Inc. v. Appellate Division, 105 Cal.Rptr.2d 552 (Cal.App.2.Dist., 2001) (discussing at length the trial court unification following a 1998 voter proposition authorizing an amendment to the state constitution); See also Stone v. State, 685 A.2d 441, 449 (Md. App. 1996) (noting that as of January 1, 1994, Massachusetts abolished their two-tier system).

Unfortunately, this disagreement or split existing among the states identifies that an individual's Fifth Amendment double jeopardy protection fragilely is dependent upon the state in which he resides. This Court should grant the Petition for Writ of Certiorari and resolve the conflict in interpretation of the fifth amendment rights.

II. Whether Utah's two-tiered system violates Due Process by requiring the defendant to file a certificate of probable cause and earn a right to appeal that is otherwise guaranteed him by federal constitutional safeguards.

The Utah trial de novo scheme, including Rule 4-608 of the Rules of Judicial Administration, Utah Code Ann. § 78-5-120 and Rule 27 of the Utah Rules of Criminal Procedure (see Appendix F) operates to deny the petitioners their constitutionally protected rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Besides violating double jeopardy rights, the scheme violates due process in a variety of ways: (a) impermissibly discourages and burdens the accused in his attempt to exercise his constitutional right to appeal, and (b) unlawfully shifts the burden to the accused requiring that he demonstrate and earn a right to appeal that is actually guaranteed him by the state constitution.

A. Our Utah scheme impermissibly discourages and burdens the right to appeal.

This Court often has demonstrated the inappropriateness of encumbering constitutionally protected rights.

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966) (citing Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956)).

The Utah scheme violates this well established rule by making it extremely burdensome to get a stay prior to the trial de novo, particularly if a forthwith sentence is ordered by the justice court. The timelines alone for a hearing on the petition are draconian as they relate to justice court matters. Often times a justice court sentence could be served before the rigorous steps of a certificate of probable cause are met.

For example, a certificate of probable cause cannot be issued except upon application of the defendant. Rule 27(d)(1). The application must

> be in writing and supported by a memorandum of law identifying the issues to be presented on appeal and supporting the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.

Rule 27(d)(2). The rule allows the prosecution 10 days to respond, and allows the court an additional 10 days after that to hear the matter. If the prosecution fails to respond the court still can wait fifteen days to hear the matter and no requirement is provided for the court to rule on the matter within any time frame. If the justice court denies the petition,

then the matter must be presented to the district court and these time lines are repeated. Meanwhile the sentence may be served while the accused is awaiting his automatic appeal in the form of a new trial.

Moreover, the economic burdens placed on a justice court defendant to accomplish even one round of filing a petition, let alone the possibility, if not the likelihood of the second round, are prohibitive for a system designed to advantage citizens in its simplicity. Likewise, numerous litigants in justice courts proceed pro se and are without the legal ken to maneuver these procedures independently. Such procedural hurdles violate due process by overly-burdening an accused in his pursuit to effect his guaranteed right to appeal the decision of the justice court to a court of record.

In fact, no circumstances actually exist for a justice court judge to find that the accused is not entitled to a de novo trial given the language in the rule itself and in the statute which guarantees the accused that right once timely requested. Notably, the rule itself (2)(d) makes no mention of the certificate but rather refers only to the filing of the notice of the appeal.

This state scheme process needlessly and impermissibly "chills" the right of the justice court defendant to appeal. In United States v. Jackson, 390 U.S. 570, 581 (1968), this Court examined legislation, the Federal Kidnapping Act, which more harshly punished defendants who elected to exercise their trial rights over those agreeing to a plea bargain. The government argued that the intent of the legislation was to mitigate punishment for those who cooperated. The government claimed the incidental effect of inducing defendants not to fully contest their charges was irrelevant. To that position the Jackson Court stated the following:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional; *the question is whether that effect is unnecessary and therefore excessive*. In this case the answer to that question is clear. . . . Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. . . . For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.

Id. at 581-83 (emphasis added; citations omitted). Due process is violated by the rule and the statute specifically as it relates to justice court cases.

B. Our Utah scheme unlawfully shifts the burden to the accused.

Our most basic principles of criminal law permit an accused to be tried while enjoying, inter alia, the presumption of innocence. Due process is violated on these facts because Rule 4-608 and § 78-5-120 eviscerate this presumption of innocence and place on an accused an impermissible burden and create a chilling effect on the exercise of appellate rights afforded under Utah's constitution and the Constitution of the United States. The scheme requires the filing of a petition and a memorandum of points and authorities in support of that petition to gain the appeal that the constitution and the scheme themselves identify as an automatic right on timely filing of the notice to appeal. Art. 1, § 12, Constitution of Utah (1896); Utah Code Ann. § 78-5-120 (2001).

This Court stated the following in In re Winship, 397 U.S. 358, 368 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Seven years later this Court reaffirmed the point and added:

> [A] State must prove every ingredient of an offense beyond a reasonable doubt, *and . . . may not shift the burden of proof to the defendant* by means of such a presumption.

Sandstrom v. Montana, 442 U.S. 510 (1979)(citations omitted; emphasis added). These quotes identify the infirmity contained in rule 4-608, that the defendant who is convicted in the justice court must meet an affirmative duty to prove or persuade the court of his automatic right to appeal. The de novo trial is an entitlement under the Constitution of Utah and the very scheme employed to provide him his appeal.

The Utah scheme requiring a certificate of probable cause to gain a right already guaranteed is too fraught with the potential to harass and otherwise burden an important constitutional right.

This Court should declare unconstitutional as violative of due process considerations this Utah scheme which impermissibly shifts the burden to the defendant to establish that he has constitutionally protected rights to appeal.

III. Whether Utah's two-tiered system violates the federal constitutional tenet of Equal Protection of the law by providing disparate treatment for similarly situated criminal defendants.

The Fourteenth Amendment of the United States Constitution prohibits the states from enacting laws that deny "any person within its jurisdiction equal protection of the laws."

Petitioners assert that equal protection rights assured by both constitutions are violated by Rule 4-608 and § 78-5-120 because the scheme they establish for an accused to perfect an appeal requires facing a second de novo trial while maintaining a guilty status from the justice court. These same circumstances are not true had the accused initially been charged in the court of record and then received a new trial on remand from the appellate court. E.g., Colten v. Kentucky, 407 U.S. 104 (1972). In the later circumstances his conviction would be purged prior to the second or new trial.

The equal protection violation occurs not because the Utah scheme has allowed the defendants to receive different types of process, but precisely because when facing the second trial as discussed above the two types of defendants are not and must not be treated any differently. Both the justice court defendant on his trial de novo and the district court defendant on his retrial after reversal of his conviction and remand from the appellate court *must* be treated the same. At that juncture in the process both defendants are indistinguishable; they are both defendants charged with crimes in a tribunal within the state and they both possess the full panoply of rights afforded anyone accused in this country of committing a criminal violation. In re Winship, 397 U.S. at 368.

This Court examined an analogous appellate situation with a New Jersey statute that authorized extracting an expense for transcripts and concluded as follows:

> Apart from its fiscal objective, the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed.
>
> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay. But any such provision must, under the Equal Protection Clause, be applied with an even hand.

Rinaldi, 384 U.S. at 310-11 (citations omitted). The Court struck down the statute in question.

Similarly, on these same equal protection grounds, this Court should correct our scheme which treats similarly situated defendants at the retrial procedures differently and thereby unconstitutionally under equal protection safeguards.

CONCLUSION

For all or any of the foregoing reasons, Petitioners respectfully request this Court to grant the petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 7th day of April, 2005.

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